

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Implementation of Section 25  
of the Cable Television Consumer  
Protection and Competition Act  
of 1992

Petition for Rulemaking of  
Ameritech New Media, Inc.  
Regarding Development of Competition  
and Diversity in Video Programming  
Distribution and Carriage

MM Docket No. 97-248

COMMENTS OF ENCORE MEDIA GROUP LLC

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## SUMMARY

Encore Media Group LLC ("EMG") submits these Comments in response to the Commission's *Notice of Proposed Rulemaking*, MM Docket No. 97-248, seeking comment on proposals to modify the Commission's rules relating to program access for multichannel video programming distribution services (MVPDs). EMG's Comments respond to three major issues raised in the *NPRM*. First, in response to requests to impose deadlines for Commission action on program access complaints, EMG states that there has been no showing that the Commission's staff has been dilatory in resolving these complaints. In addition, the deadlines suggested -- 90 to 120 days, depending on whether there has been discovery -- are unreasonably short and fail to take into account the complexities that may be encountered in one case as compared to others. Further, these suggested time limits unnecessarily impose restraints on the Commission's ability to allocate valuable staff resources and to make judgments on Commission priorities, determining in advance that such complaints are more important than any other business before the Commission. The related proposals to shorten the time period for responses to complaints from 30 to 20 days should also be rejected, because they would save little time ultimately but would adversely affect the ability of respondents to gather responsive evidence and present their best arguments.

EMG also opposes the proposals to expand discovery in program access proceedings and allow complainants broad discovery as of right. Again there is no credible showing that the present system, where discovery is carefully controlled by Commission staff, is preventing the Commission from resolving program access complaints fully and expeditiously. Expanding

discovery would legitimize unconstrained fishing expeditions in an area where virtually all information is highly sensitive and proprietary.

Finally, EMG opposes the request that the remedies available for program access complaint proceedings be expanded to include the assessment of damages to the successful complainant. Although the Commission had previously concluded that it had the authority to assess damages in these cases, it had decided as well that it was inappropriate to do so. EMG submits that the Commission does not have clear authority under the law to assess damages in program access cases, and that such an assertion of authority would now present a substantial risk of appellate litigation on this issue. In addition, the assessment of damages continues to be inappropriate in program access cases. The forfeiture schedule imposing substantial forfeitures for program access violations has only recently gone into effect, and it cannot yet be concluded that those forfeitures fail to provide an adequate deterrent. Additionally, assessment of damages would substantially complicate and delay resolution of program access complaint proceedings, thereby frustrating the Commission's goal, and that of the complainants, of expeditious resolution of complaint proceedings.

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<b>Regarding Development of Competition</b>	)	
<b>and Diversity in Video Programming</b>	)	
<b>Distribution and Carriage</b>	)	
 <b>To: The Commission</b>		

**COMMENTS OF ENCORE MEDIA GROUP LLC**

Encore Media Group LLC ("EMG") submits these comments in response to the Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-248, released December 18, 1997 ("*NPRM*"). The *NPRM* sought comments from interested parties relating to proposals to amend the Commission's existing rules relating to program access. EMG is a major provider of video programming services to cable television systems, direct broadcast satellite (DBS) service providers, wireless cable operators, satellite master antenna services (SMATV), open video systems (OVS), and home satellite dish programming providers (TVRO). EMG operates eleven video program networks, including ENCORE, STARZ!, STARZ!<sup>2</sup>, MOVIEplex, Love Stories, Action, Mysteries, Westerns, True Stories, WAM! America's Kidz Network, and BET Movies/STARZ!<sup>3</sup>.

I. Introduction

Section 628 of the Communications Act, 47 U.S.C. §548, was adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") for the purpose of increasing competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems. Section 628 directed the Commission to prescribe regulations that govern the access by competing multichannel systems to cable programming services. Section 628(b) provides that:

it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

In response to this directive, the Commission adopted the program access rules, 47 C.F.R. §76.1000-1004, to identify and prohibit the specific conduct that would violate Section 628. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order ("*First Report and Order*"), 8 FCC Rcd 3359 (1993), recon. granted in part and denied in part, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order ("*Order on Reconsideration*"), 10 FCC Rcd 1902 (1994).

This rulemaking proceeding was initiated in response to a Petition for Rulemaking filed by Ameritech New Media, Inc. ("Ameritech"). Ameritech requested that the Commission

amend its program access rules in several respects which Ameritech claims would strengthen the effectiveness of those rules.

The fundamental problem here is that the proposals set forth in the *NPRM* are solutions in search of a problem. The parties supporting the initiation of this proceeding have failed to demonstrate that the existing rules are not effective in preventing discriminatory behavior by vertically integrated program suppliers.<sup>1</sup> If there is a concern that distribution systems using newer technologies such as DBS or OVS or wireless cable are not providing sufficient competition so as to suppress cable retail prices, that deficiency, if it exists, is not caused by program access rule “weaknesses,” but by other technological and marketplace-based reasons. In 1992, when Section 628 was passed as part of the 1992 Cable Act, there was a discernible problem in certain programmers refusing to deal with new delivery systems. Now, six years later, virtually every delivery system has available to it at nondiscriminatory prices virtually every programming service. The program access rules have been extremely successful in ensuring that all programming is available to all multichannel video programming distributors. Nonetheless, because of the importance of this proceeding, EMG submits these comments in response to the specific issues raised in the *NPRM*.

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<sup>1</sup> DBS operator DIRECTV and the Small Cable Business Association (“SCBA”) had requested that the Commission examine under what circumstances the program access rules should be extended to acts or practices by programmers which are not vertically integrated with cable system operators. The *NPRM*, however, had stated at paragraph 36 that the Commission did not have sufficient evidence to recommend any change in the rules to extend their reach to non-vertically integrated programmers. EMG notes that it is a vertically integrated programmer because a cable operator is the majority owner of its parent corporation. Therefore, EMG is subject to the current rules. While EMG submits that there is little rational basis for subjecting EMG to these rules while its competitors are not subject to them, EMG does not dispute the Commission’s conclusion not to pursue a change in the rules as requested by these parties.

## II. Time Limits for Complaint Pleadings and Proceedings

The *NPRM* seeks comment on two general issues relating to imposing time constraints on program access complaint proceedings. First, the *NPRM* seeks comment on whether the Commission should adopt time limits for resolution of program access complaints. Specifically, the Commission seeks comment on the proposal that the Commission issue rulings within 90 days after the filing of the complaint in cases not involving discovery and within 150 days after the filing of the complaint in cases in which discovery is conducted. Second, the *NPRM* seeks comment on the proposal that the time for filing an answer to a program access complaint be shortened from 30 days to 20 days, and the time for filing a reply be shortened from 20 to 15 days.

EMG submits that neither of these proposals should be adopted. With respect to overall time limits, the proponents of this rulemaking have failed to demonstrate that the Commission's staff is presently derelict in resolving these complaints. To the contrary, the Commission's staff currently works as expeditiously as possible in resolving such complaints. In the few cases where there has been some delay in resolving such cases, the delay has been attributable to a variety of factors beyond the control of the Commission's staff. In addition, program access complaints may involve a broad range of issues and varying degrees of complexity. For example, a complaint based on an alleged refusal to deal is substantially different from, and likely much simpler to resolve than, a complaint based on price discrimination. Another case may involve a combination of such issues. While the presence of discovery may be one factor in determining how long it should reasonably take for the Commission's staff to render a decision, there are many other factors that are relevant to determining how long the

Commission's action should take. A single, short time limit for the broad variety of such cases is inappropriate and impracticable.

Moreover, the imposition of such tight deadlines in all cases may severely overburden the Commission's limited staff. Due to budgetary constraints, the Commission does not have the luxury of being able to assign an unlimited number of staff members to resolving program access complaints. To the contrary, the Commission must be able to assign and reassign staff members based on reasonable judgments of appropriate priorities. At any given time staff members may need to be allocated to more important matters without artificial constraints to the effect that program access complaints are automatically deemed more important than any other issues before the Commission.

With respect to the proposal to shorten the time periods for responsive pleadings, EMG agrees with the Commission's tentative conclusion that little would be gained from such action, while parties responding to the complaint would be severely limited in their ability to provide their best responses and supporting evidence. Indeed, the party filing a complaint has as much time to plan, prepare, and marshal their arguments and evidence as it pleases; its only constraints are commercial ones to the extent that it is in fact facing prohibited actions by the programmer. The respondent, however, needs the reasonable time of 30 days to investigate the allegations, gather the evidence, and present the best case to address the allegations. The responses are of necessity often complex and detailed, and there is no justification for forcing the programmer to cut short that minimal amount of time necessary to do an adequate job. The proposal to shorten that complaint response time would severely prejudice the programmer's ability to provide an effective response to an extremely important and serious matter. Since the

initial filing of the complaint is not subject to any such limit, the proposal would dramatically shift the burden against the programmer. For these reasons, there is no rational basis for shortening the time for the response and the reply.

### III. Expansion of Discovery

The *NPRM* also seeks comment on the proposal that complainants be permitted discovery as of right rather than the current regime whereby discovery is carefully controlled by the Commission's staff reviewing the complaint. Under the current procedures, if the staff determines that the complainant has established a *prima facie* case and that additional information is necessary to resolve the complaint, then the staff will determine what additional information is necessary and establish a discovery process for resolution of the complaint. In the alternative, the staff can direct the parties to submit discovery requests and supporting memoranda and then issue a ruling to resolve any issues relating to those request.

EMG agrees strongly with the Commission's conclusion set forth in the *First Report and Order* and its tentative conclusion set forth in the *NPRM* that there has been no showing that discovery as of right would improve the quality or efficiency of the Commission's resolution of program access complaints or that the current system is inadequate. Moreover, the Commission is absolutely correct that given the sensitive and proprietary nature of the information involved in program access matters, discovery "as of right" would inevitably require Commission resolution of objections and responsive motions at every step.

Indeed, as is often the case in court cases involving discovery under the Federal Rules of Civil Procedure, discovery without restraint is often used either as a weapon to create undue burdens on defendants or as a fishing expedition to search for competitive information

irrelevant to the actual complaint. The Commission itself has recognized as well that discovery is often used for tactical reasons rather than to gather relevant evidence; in *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18342 (1996), the Commission concluded that in Common Carrier Bureau complaint proceedings, the Commission staff should carefully control and limit the scope of discovery because such limitation “could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes.” Moreover, in program access proceedings perhaps more than in any other context, virtually every bit of evidence is highly sensitive and proprietary.<sup>2</sup>

EMG does support the adoption of a standard protective order for use in Section 628 program access proceedings, as proposed in Paragraph 44 of the *NPRM*. The use of such a standardized protective order would likely expedite the disclosure of necessary information because it could help assuage the concerns of programmers about the possible public release of such competitively sensitive material and obviate the need to litigate the scope of a protective order in each case. Additionally, the use of the standardized strict protective order as proposed would protect a programmer from concerns that the protective order issued in a particular case by a Commission staff member is weaker than it should be. Use of the standardized protective order would minimize the likelihood of interlocutory appeals over the scope of such orders.

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<sup>2</sup> For example, in a program access complaint proceeding brought by Americast against Rainbow Programming Services last year, virtually every page of every pleading from each party was redacted because each party considered so much of what was discussed to be competitively sensitive and proprietary.

The critical issues in the use of a standardized protective order are first, that the standard protective order must be stringent enough to provide effective protection for this sensitive material, and second, that there must be strong and effective enforcement for violations of the protective order. With respect to the scope of the protection afforded by the draft protective order proposed as Appendix A to the *NPRM*, that draft is a good start. However, there are three issues which must be addressed. First, with respect to Paragraph 2 of the draft standardized protective order, that paragraph notes that “The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 & 0.461, determine that all or part of the information claimed as ‘Confidential Information’ is not entitled to such treatment.” EMG suggests that in conjunction with this provision, the Commission should amend Section 0.457(d)(1) to include a specific reference to materials produced in response to a program access complaint for which the supplying party has requested confidentiality as being included among the types of information provided on a confidential basis pursuant to 5 U.S.C. § 552(b)(4) for which it is unnecessary to submit a special request for confidentiality. Such a modification of Section 0.457(d)(1) to include a specific reference to materials submitted in response to a program access complaint would also clarify that if the materials are later denied such confidential treatment pursuant to the above-quoted provision in the instant complaint proceeding or elsewhere or granted disclosure pursuant to an FOIA request, the Submitting Party would have full rights to file an immediate application for review and subsequent court appeal, prior to any disclosure, pursuant to Sections 0.459(g) or 0.461(h), as applicable. Clarification of these rights now would be far preferable to having to litigate them later.

Second, with reference to Paragraph 5 of the draft standardized protective order, it is stated that consultants under contract to the Commission may obtain access to the Confidential Information if they have signed *either* a nondisclosure agreement as part of their employment contract *or* the attached Declaration. Because it is not clear what the substance or prohibitions in such undefined “nondisclosure agreement” might be, such consultants should be required to execute the Declaration as well in all cases.

Third, in Paragraph 14 of the standardized protective order, it is suggested that the Authorized Representatives of the Reviewing Parties may at their choice either destroy or return the Confidential Information to the Submitting Party. EMG submits that the choice of destruction or return of all copies should be that of the Submitting Party, not the Reviewing Party. Indeed, the *First Report and Order* adopting the program access rules specifically stated on this very issue that “Upon termination of the proceeding, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, *will be provided to the producing party.*” 8 FCC Rcd 3359, 3391 n. 103, by reference from note 226, *id.* at 3419. Other than these three issues, the standardized protective order attached as Appendix A to the *NPRM* on its face does appear to afford adequate protection to the parties to a program access complaint proceeding against the disclosure of sensitive proprietary business information.

However, while that draft requires any Authorized Representative to submit the Declaration (Attachment A) attesting that he or she has read the protective order, that he agrees to be bound by its terms, and that he acknowledges that a violation of the protective order is a violation of an order of the Commission, it is not at all clear what the punishment might be for

violation of that “order,” by either the complainant, its counsel, or an employee of who has left the complainant’s or its counsel’s employ.<sup>3</sup> For this reason, the Commission should designate at this stage the appropriate sanctions which can be imposed against both the company and any individuals who violate the protective order.

#### IV. Damages as a Remedy in Program Access Complaint Proceedings

The *NPRM* seeks comment on the request that the program access rules be amended to provide for damages as a possible remedy for violations of the program access rules, in addition to the existing remedies of ordering the violative programmer to provide the programming to the complainant on a nondiscriminatory basis and/or impositions of forfeitures against the violative programmer. The proponents of this rulemaking have argued that these existing remedies are inadequate, and that damages should also be awarded to successful complainants.

EMG strongly disagrees with this proposal.. First, we note that in the *First Report and Order*, the Commission had concluded that it did not have authority to award damages in price discrimination cases under the program access provisions of Section 628 of the Act. 8 FCC Rcd 3359, 3420. On reconsideration, however, the Commission reversed itself, holding that its authority under Section 628 “is broad enough to include any remedy the Commission reasonably deems appropriate, including damages.” *Order on Reconsideration*, 10 FCC Rcd 1902, 1911. The Commission reached this conclusion while recognizing that “the statute does

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<sup>3</sup> Indeed, the Commission must recognize that even where a declaration is signed by the Authorized Representative of a complainant asserting that he will not use the confidential information for competitive purposes, it is pure fiction to imagine that such person will wipe all knowledge of the confidential information clean from his mind when he goes back to doing his regular job.

not expressly use the term ‘damages,’ [but] it does expressly empower the Commission to order ‘appropriate remedies.’” *Id.* Nonetheless, the Commission declined to exercise the authority it believed it possessed to award damages as an appropriate remedy, but suggested it might revisit this decision if it were brought to the Commission’s attention “that the current processes are not working.” *Id.* The current inquiry as to whether a damages remedy should be adopted is a result of the proponents’ claim that the current procedures are not working.

The flaw, however, is that there has been no credible showing that the current processes, including reformation of discriminatory contracts and/or forfeitures, are not working. First, any claims that the current processes are not working are purely anecdotal and unsupported. Indeed, the forfeiture guidelines stating a baseline forfeiture of \$7,500 per day for violation of the program access rules was just adopted six months ago, and there has been little experience or actual cases considering this remedy.<sup>4</sup> That amount is certainly a most formidable, if not unconscionable, deterrent -- a violation lasting 90 days might result in a baseline forfeiture of \$675,000. It can hardly be claimed that the present forfeiture guidelines do not provide an adequate remedy.

With respect to consideration of damages as an additional remedy, however, EMG submits that, notwithstanding the conclusion in the *Order on Reconsideration* to the contrary, the Commission does not have the authority to award damages in Section 628 program access proceedings. Section 628 does not expressly render programmers liable for damages, give complainants the right to sue for damages, or authorize the Commission to determine whether

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<sup>4</sup> The forfeiture guidelines were only released July 28, 1997. *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, Appendix A, \_\_ FCC Rcd \_\_ (rel. July 28, 1997).

any complainant is entitled to damages. As the courts have consistently held, “when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.” *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979) (citations omitted). Where, as here, Congress has provided a specific remedy, “it is an elemental cannon of statutory construction that . . . a court must be chary of reading others into it.” *Id.* at 19. While as noted above the Commission concluded in the *Order on Reconsideration* that it did have the authority to award damages, that conclusion was not challenged on appeal to the courts because of a lack of ripeness due to the concurrent conclusion not to exercise such authority. The Commission must seriously consider this litigation risk if it chooses to pursue this questionable course of action.

In any event, even if the Commission does have authority under Section 628 to award damages, there is no reason to disturb the Commission’s previous conclusion that damages are inappropriate as a remedy in program access complaints. The Commission’s expedited proceedings are founded upon its prior conclusion that it could presume harm. However, if a damages remedy were added, a complainant would have to prove such harm as a necessary element of its claim. This would complicate and delay the resolution of program access proceedings -- the opposite of what the Commission is trying to achieve.

Indeed, assessment of damages would grossly complicate and delay resolution of program access complaint proceedings. Consideration of damages would require the Commission to evaluate competing proofs as to the computation of lost profits or other measures of damages. Such complex analyses would overly burden the Commission’s staff, delaying not only the resolution of the complaint at hand, but limiting the number of other

program access cases each Commission staff member can handle. Such inherent delay and complication is inherently at odds with the primary demand of the proponents of this rulemaking for prompt resolution of program access complaint proceedings. Allowing damages as a remedy will prolong rather than expedite resolution of program access complaints. While bifurcation of program access proceedings may help in the management of these cases, it will not make up for the additional time and staff resources that will be taken in evaluating damages.

One major complication in assessing damages is that the proper measure of damages is not simply the difference between the rate charged and a nondiscriminatory rate, but rather the measure must be the profits lost by the complainant as a result of the discriminatory rate. In the roughly analogous arena of complaints against common carriers for charging discriminatory rates under Section 202 of the Communications Act, the Commission has held that the appropriate measure of damages would not be the difference in wholesale prices paid by the complainant and the allegedly favored distributor, but rather the business lost by the complainant to the allegedly favored distributor. *Illinois Bell Tel. Co. v. American Tel. & Tel. Co.*, 4 FCC Rcd 5268, 5272 n. 13, *recon. denied*, 4 FCC Rcd 7759 (1989). While lost profits attributable to the discriminatory rate is the proper measure of damages, it is also more complex to establish such lost profits as compared to the simpler process of establishing the difference between the discriminatory rate and the nondiscriminatory rate, thereby causing an even greater strain on Commission staff resources.

As a final matter, EMG strongly agrees with the Commission's tentative conclusion that punitive damages should not be imposed in program access proceedings. With huge forfeitures

available to serve as a substantial deterrent to anticompetitive behavior, there is no basis to award punitive damages for the benefit of the major corporations that operate the alternative programming distribution outlets. EMG notes as well that punitive damages are not awarded in common carrier complaint proceedings, and there is no showing that punitive damages would be appropriate in any case.

## V. Conclusion

EMG believes that the program access rules at present are a tough and effective means of insuring that all multichannel video programming outlets have an equal ability to obtain the valuable programming that drives subscriptions to those competing services. These rules have effectively leveled the playing field, but these rules cannot be the sole basis for introducing full and equal competition between competing systems of program delivery. There are many other factors which affect the ability of competing delivery systems to compete with each other. To the extent that new technology distribution entities may believe they are handicapped in competing with traditional wired cable systems, the cause, if any, is to be found elsewhere. The suggestion that the cause of such inability to compete is because the program access rules are too weak is unsupported by anything other than a smattering of anecdotal "evidence." These anecdotal allegations are insufficient to justify further intrusions into the reasonable business activities of the vertically integrated programmers who themselves are engaged in a bitterly competitive marketplace battle against the non-vertically integrated programmers. For these

reasons and the reasons stated above, the present program access rules should not be changed as proposed in the *Notice of Proposed Rulemaking*.

Respectfully submitted,

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